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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 425 and 555

SEABOARD AIR LINE RAILROAD COMPANY, ET AL.,
Appellants

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.,
Appellees

INTERSTATE COMMERCE COMMISSION,
Appellant

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.,
Appellees

On Appeals From the United States District Court for the Middle District of Florida, Jacksonville Division

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MOTION TO AFFIRM OF FLORIDA EAST COAST RAILWAY COMPANY, APPELLEE

Appellee, Florida East Coast Railway Company, moves to affirm the judgment below. No important purpose would be served by plenary review in this

Court prior to further proceedings before, and further findings and orders by, the Interstate Commerce Commission in accordance with the opinion of the District Court. *Florida East Coast Railway Company, et al.* v. *United States, et al.*, 242 F.Supp. 14 (MD Fla. 1965). These are direct appeals under 28 U.S.C. § 1253 from the final judgment entered May 13, 1965, by a specially constituted district court of three judges, enjoining and annulling orders of the Interstate Commerce Commission without prejudice to further proceedings before, and further findings and orders by, the Commission.[1]

The orders of the Commission, entered under section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), authorize, subject to specified conditions, a merger of the Atlantic Coast Line Railroad Company into the Seaboard Air Line Railroad Company, and the related acquisition of control by the merged company of carriers subsidiary to or affiliated with Atlantic Coast Line, including the Louisville and Nashville Railroad Company.

Seaboard Air Line Railroad Company, Atlantic Coast Line Railroad Company, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company[2] filed notices of appeal in No. 425 on

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[1] The Commission's report, dated December 2, 1963, is printed at 320 I.C.C. 122. The opinion of the dissenting Commissioners is printed at 320 I.C.C. 214. The Commission's order authorizing the merger and a further order dated March 4, 1964, denying reconsideration are printed in Appendices B and C of the Jurisdictional Statement in No. 425.

[2] The merged company is to be directly controlled by The Atlantic Coast Line Company, a holding company now in control of Atlantic Coast Line Railroad. The merged company is to be indirectly controlled by Mercantile-Safe Deposit and Trust Company, which holds 56 per cent of the stock of The Atlantic Coast Line Company.

June 9, 1965. The Interstate Commerce Commission filed notice of appeal in No. 555 on July 12, 1965. On motion of appellees, Mr. Justice Black extended to October 11, 1965, the time for filing motions to dismiss or affirm in No. 425.

QUESTION PRESENTED

Was the District Court correct in setting aside orders of the Interstate Commerce Commission approving the merger of the Atlantic Coast Line and Seaboard railroads, without prejudice to further proceedings before or further findings and orders by the Commission, on the ground that the Commission had failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section 7 of the Clayton Act by failing to define the line of commerce and section of the country in which to appraise the probable competitive effects of the proposed merger and by failing to determine whether the effect of the merger may be substantially to lessen competition or tend to create a monopoly? (242 F. Supp. 14, 22).

STATEMENT

1. Atlantic Coast Line and Seaboard are major interstate railroad systems with a network of lines serving the six-state area of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. The combined Atlantic Coast Line and Seaboard would be under any standard the largest single railroad system in the Southeast.

Atlantic Coast Line operates more than 5000 miles of track and is now the second largest railroad in the six-state area. Seaboard operates more than 4000 miles of track and is now the third largest railroad in the

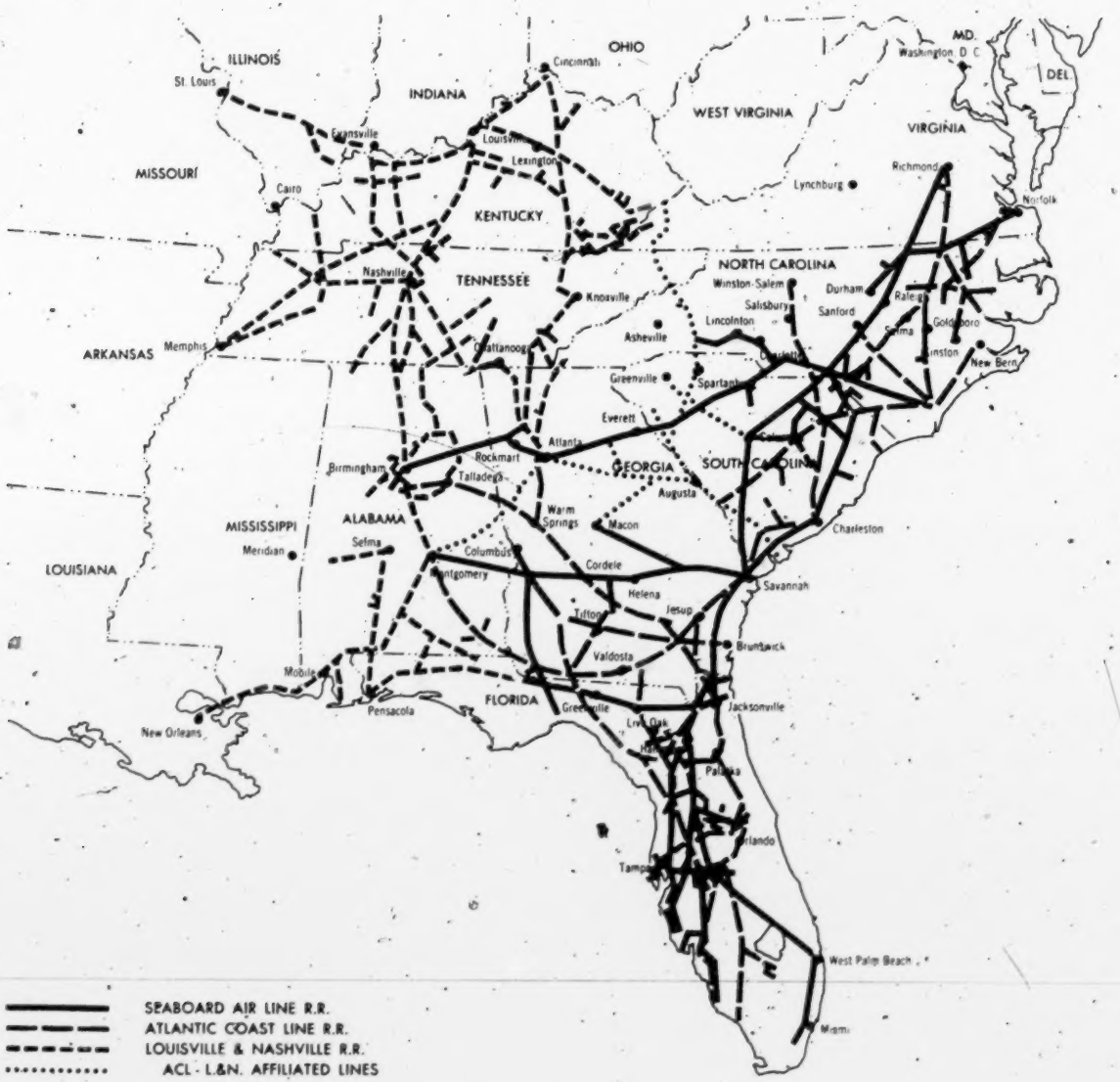
six-state area. Atlantic Coast Line and Seaboard together operate approximately 54 percent of the total rail lines in the area. The next largest system would be the Southern Railway System with 7876 miles of track representing approximately 34 percent of the total rail lines in the area. Adding Tennessee and Kentucky to the six-state area, and control of the Louisville and Nashville, the merged company would operate over 15,000 miles of line, again about 54 percent of the total rail lines in the area, as compared with 9045 system miles or 34 percent operated by the Southern (320 I.C.C. at 163).

Atlantic Coast Line and Seaboard operate essentially parallel lines of railroad. The lines of Atlantic Coast Line extend from Richmond and Pinners Point, Virginia, to Jacksonville and Tampa, Florida. The lines of Seaboard extend from Richmond and Portsmouth, Virginia, to Jacksonville, Tampa, and Miami, Florida. The two railroads serve virtually all major rail terminals in the six-state southeastern area, including Atlanta and Savannah, Georgia, and Montgomery and Birmingham, Alabama. Atlantic Coast Line and Seaboard serve a total of 121 common points in the six-state southeastern area (320 I.C.C. at 164). The map facing this page shows the lines of Atlantic Coast Line, Seaboard, and Louisville and Nashville.

The operating routes and services of Atlantic Coast Line and Seaboard are generally competitive. Atlantic Coast Line and Seaboard compete for the same types of freight and passenger traffic both within the six-state southeastern area and to and from areas and markets beyond their direct lines (App. E, J.S. No. 425, pp. 177-178). 39.4 percent of the total annual carload freight traffic, and 33.4 percent of the total

MAP 1 (Exhibit H-155)

PRESENT LINES OF PROPOSED SEABOARD—COAST LINE—L. & N. SYSTEM



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tonnage (including less-than-carload freight), of Atlantic Coast Line and Seaboard is now competitive. Competitive carload freight produced $131,000,000 in revenues, or 47.8 percent of total carload freight revenues of the two railroads, in 1957 (Ex. H-253). Of this amount, $54,000,000 will be wholly noncompetitive with any other railroad after the merger (320 I.C.C. at 163-164). This large volume of freight traffic, for which competition will be entirely eliminated by the merger, does not indicate the full extent to which the merged company will have a monopoly of railroad service at origin or destination points. At least 64 percent of the carload freight traffic, producing 57 percent of the merged company's total carload freight revenues, would be derived from traffic for which the merged company would have no competition at origin or destination points, or both (Ex. H-213, p. 7).

The consequences of the merger would be particularly severe in Florida, where Atlantic Coast Line and Seaboard are the largest railroads. Together they operate 81 percent of the total rail mileage in Florida (320 I.C.C. at 163). They are the only railroads operating throughout the central and west coast areas of Florida, including the Tampa port area. 33 percent of Atlantic Coast Line's and 24 percent of Seaboard's total system tracks are located in Florida (320 I.C.C. at 140).

Atlantic Coast Line and Seaboard presently compete in Florida at 59 points served by no other railroad (320 I.C.C. at 165). Revenues obtained by the merging railroads in 1959 on freight traffic originating or terminating at the 59 competitive points amounted to $59,500,000 (App. E, J.S. No. 425, pp. 104-106).

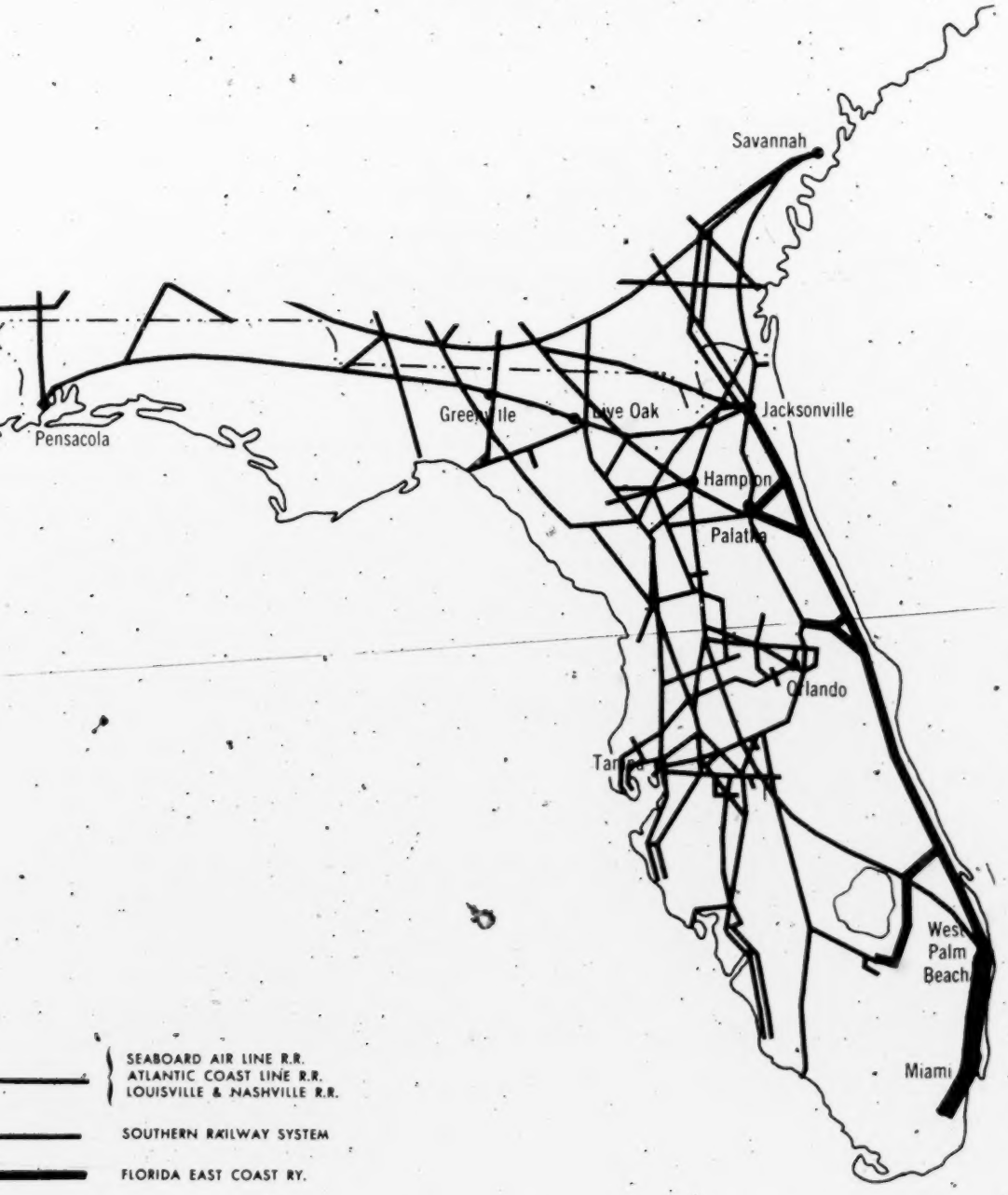
The third largest rail carrier in Florida is Florida East Coast with 572 miles of line or 13 percent of the total rail lines in the state. The main line of Florida East Coast runs between Jacksonville and Miami. Seaboard is presently a direct competitor of Florida East Coast in the area between West Palm Beach and Miami. Atlantic Coast Line does not operate lines on the east coast of Florida south of Jacksonville. The map facing this page shows the lines in Florida of Atlantic Coast Line, Seaboard, and Florida East Coast.

Florida East Coast now connects at Jacksonville with Atlantic Coast Line on traffic moving to or from the east coast of Florida, including such points as Miami, Port Everglades, and West Palm Beach. The joint Atlantic Coast Line-Florida East Coast routes and services are directly competitive with the routes and services of Seaboard to and from the east coast of Florida (320 I.C.C. at 172).

Both Atlantic Coast Line and Seaboard are financially strong and prosperous railroads. Neither is in danger of financial difficulty (App. E, J.S. No. 425, p. 197; 320 I.C.C. at 146). The operations of Atlantic Coast Line and Seaboard have been consistently profitable. Net railway operating income in 1961 was $10,800,000 for Atlantic Coast Line and $14,600,000 for Seaboard. The 1962 net railway operating income of Atlantic Coast Line increased to $16,100,000; to $18,100,000 for Seaboard (320 I.C.C. Apps. VIII and IX at 257-265). In 1962 Atlantic Coast Line had assets of $571,400,000, Seaboard of $438,400,000 (320 I.C.C. App. VII at 253-256). Both have adequate net working capital, substantial equity in physical properties, and favorable debt-equity ratios. The merged railroad would have assets of over a billion dollars,

MAP 5 (From Exhibit H-155)

PRESENT MAJOR CLASS I RAILROAD LINES IN FLORIDA



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annual operating revenues of $340,000,000, combined net income of about $32,000,000.

Tonnages and revenues from the principal commodities[3] transported by Atlantic Coast Line and Seaboard have increased substantially. From 1946 to 1959 Seaboard's tonnage on nine principal commodities increased 109 percent for increased revenues of 174 percent. Atlantic Coast Line's tonnage on nine principal commodities during the same period increased 89 percent for an increase of 139 percent in revenues (320 I.C.C. at 231-232, dissenting opinion).

2. The Commission discussed at some length—but only in the most sweeping and general terms—the competitive consequences of the proposed merger. The Commission made no appraisal of the competitive areas or services of Atlantic Coast Line and Seaboard. The Commission strongly suggested, but carefully refrained from specifically finding, that competition and prevention of monopoly are concepts inapplicable

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[3] The nine principal commodities transported by Atlantic Coast Line and Seaboard in 1959, constituting about 75 percent of their carload tonnage and 45 percent of their carload freight revenues, were:

Seaboard	*Atlantic Coast Line*
Phosphate rock	Phosphate rock
Stone and rock, etc.	Stone and rock, etc.
Pulpwood	Pulpwood
Bituminous coal	Gravel and sand
Gravel and sand	Bituminous coal
Fertilizers, N.O.S.	Fertilizers, N.O.S.
Cement: natural and portland	Cement: natural and portland
Paperboard, etc.	Products of agriculture, N.O.S.
Clay and bentonite	Paperboard, etc.

(App. E, J.S. No. 425, pp. 12-13).

to railroad transportation.[4] The Commission relied heavily upon the existence of other transportation modes to reach a general conclusion that the reduction in railroad competition resulting from this merger would have no appreciable adverse effect upon the public (320 I.C.C. at 167). Motor and water carriers are at best, however, limited competitors for the low-value, heavy-loading commodities that make up the bulk of traffic for which Atlantic Coast Line and Seaboard are now competitors. Atlantic Coast Line and Seaboard, as railroads, have advantages not inherent in other modes of transport, in terms of service areas and costs in the movement of these commodities. The Commission, however, refused to define any service market in which to appraise the competitive overlap of Atlantic Coast Line and Seaboard or the extent of effective competition between the merging railroads and other modes of transport.

The Commission attached routing and gateway conditions as well as employee protective provisions to authorization of the proposed merger (320 I.C.C. at 267-269). Number 14 of the routing and gateway con-

[4] The Commission, for example, noted the rail monopoly that would exist in "portions of Florida," but concluded that the monopoly would be without significance, since it "would merely supplant the duopoly which has long existed there and from which there have been no appreciable adverse competitive effects upon communities or the shipping public" (320 I.C.C. at 165). At another point, while denying "exact comparability," the Commission compared railroads with public utilities essentially monopolistic by nature and observed: "As railroads have the basic economic characteristics of public utilities and are subject to regulation in the public interest at both the Federal and State levels, it is not realistic to insist that intramodal rail competition must be preserved at all places, at all times, and under all circumstances" (320 I.C.C. at 167).

ditions has special application to Florida East Coast and eight other small railroads whose operations would be competitive with those of the merged company.[5] Condition 14 provides a mechanism for inclusion of these railroads, including Florida East Coast, in the merged company during a five-year period following the effective date of the merger.[6]

This condition recognizes that with the merger Florida East Coast will no longer have the Atlantic Coast Line as a collaborator in competition with the Seaboard. The merged company will compete directly with Florida East Coast. Substantial revenues from traffic now handled jointly by Atlantic Coast Line and Florida East Coast will be diverted to the single-line

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[5] Condition 14 applies to Florida East Coast; Apalachicola Northern Railroad; Atlanta and West Point Rail Road Company; Atlantic and Danville Railway Company; Columbia, Newberry and Laurens Railroad Company; Georgia Railroad; Norfolk Southern Railway Company; Piedmont and Northern Railway Company; and Western Railway of Alabama (320 I.C.C. at 186).

[6] Condition 14 provides: "The Commission will retain jurisdiction for a period of five years following the date of consummation of the merger to permit the filing of petitions by the carriers by railroad specified in the report herein, for inclusion in the transaction. The Seaboard Coast Line Railroad Company will be required to negotiate in good faith with respect to the proposals for inclusion presented to it by such petitioning railroads and to cooperate to the fullest extent in the compilation of an adequate record to provide a basis for the required determination by this Commission as to whether such transaction would be consistent with the public interest. In the event the parties are unable to agree, and the Commission after hearing concludes that the transaction would be consistent with the public interest, it will issue an order directing the Seaboard Coast Line Railroad Company to include the petitioning railroad upon such terms and conditions as the Commission finds to be just and reasonable" (320 I.C.C. at 268-269).

routes of the merged company (320 I.C.C. at 172-175). Condition 14 is recognition on the part of the Commission that elimination of Florida East Coast as a competing railroad is not only a possible but also a permissible consequence of the merger.

Implementation of Condition 14 with respect to Florida East Coast would give the merged company a monopoly of rail transportation not only in central and western Florida but on the entire east coast south of Jacksonville as well. The Commission made no findings or conclusions respecting the public interest in creation of a complete monopoly of rail transportation in Florida. Nor did the Commission seek to accommodate extension of the monopoly of the merged company, implicit in Condition 14, with pertinent antitrust legislation.

The dissenting Commissioners strongly attacked the Commission's approval of the proposed merger (320 I.C.C. at 214-246). It was the view of these Commissioners that the Commission ". . . neither explained the policy of the antitrust laws in any meaningful way nor decided to what extent, if any, the proposed merger is inconsistent with antitrust law and policy. . . ." (320 I.C.C. at 220) To these Commissioners it is impossible "to give any meaningful consideration to the antitrust laws without determining whether or not those laws, but for immunity conferred under section 5(11), would condemn the proposed merger" (320 I.C.C. at 220).

3. Florida East Coast brought this action against the United States and the Commission to set aside and enjoin the orders on the ground, among others, that the Commission's findings on reduction of competition

were not supported by adequate consideration of antitrust policy as required by controlling decisions of this Court. The Railway Labor Executives' Association and the Southern Railway Company and its affiliated companies in the Southern Railway System intervened as parties plaintiff. The United States, represented by the Attorney General, opposed the merger and was realigned as a party plaintiff. Seaboard, Atlantic Coast Line, The Atlantic Coast Line Company, and Mercantile-Safe Deposit and Trust Company intervened in support of the orders of the Commission.

The District Court, in an opinion by Circuit Judge Rives, unanimously held that

> . . . the Commission must define the "line of commerce" and "section of the country" in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly." The reason the Commission must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must be measured in terms of criteria that have been developed by Congress and the courts. 242 F. Supp. at 22 [footnote omitted]

This holding was predicated upon this Court's decisions in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944) and *Minneapolis & St. Louis Ry. Co.* v. *United States,* 361 U.S. 173 (1959), and the statutory duties and powers of the Commission under the Transportation and Clayton Acts.

The District Court concluded that the Commission "failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section

7 of the Clayton Act." 242 F. Supp. at 22. The Commission failed to make adequate findings as to the commercially realistic and economically significant markets in which to measure the anticompetitive consequences of the merger. The Commission concluded, only in terms of the southeastern states as a whole, that no substantial reduction in rail competition would result from this merger. 242 F. Supp. at 22. The Commission relied on the existence of other modes of transport in the area to reach the conclusion that there would be no adverse effect upon shippers and communities from the proposed reduction in rail competition. The Court held: "Reference to tonnage and dollar aggregates to show the decline of railroad transportation and rise of other modes of transportation, and such statistics as the number of truck registrations in an area, are not, in themselves, determinative." 242 F. Supp. at 23. For antitrust purposes, a meaningful analysis of the reasonable interchangeability of other modes of transport for railroad service is required. 242 F. Supp. at 23. The Court suggested that railroads, due to inherent cost and service advantages, may at least constitute a relevant market for transportation of heavy-loading, low-valued bulk commodities. 242 F. Supp. at 23, note 39. Routing and gateway conditions, the Court noted, also bore a distinct relationship to the possible anticompetitive consequences of the merger. The routing and gateway restrictions imposed by the Commission were not, however, related to the markets affected by the proposed merger. 242 F. Supp. at 21-22. The Commission failed "to employ Clayton Act standards as relevant to the public interest" or assumed that "private interest is consistently compatible with the public interest." 242 F. Supp. at 22.

The District Court set aside the orders of the Commission without prejudice to further Commission proceedings, findings, and orders not inconsistent with the Court's opinion. The Court held that the antitrust laws are not the measure of permissible railroad mergers and pointed out that this merger may be approved if, after adequate findings on the resulting lessening of competition or tendency toward creation of a monopoly, the Commission determines that the policy of the Transportation Act would otherwise be thwarted. 242 F. Supp. at 21. The Court rejected the request of the United States that a merger of Atlantic Coast Line and Seaboard be permanently enjoined. 242 F. Supp. at 23-24.

The District Court did not, in view of its disposition of this case, reach the other contentions urged by plaintiffs to invalidate the Commission's orders. Consideration of these contentions, the Court concluded, would be premature.[7] 242 F. Supp. at 24.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE SUMMARILY AFFIRMED

1. The District Court unanimously held that the Commission must measure antitrust policy in terms of criteria embodied in the Clayton Act. The analysis of the District Court, by Circuit Judge Rives, is dis-

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[7] Seaboard, et al. (J.S. No. 425, p. 5) request that, if probable jurisdiction is noted, this Court reach and decide issues not considered by the District Court. The Commission (J.S. No. 555) made no such request. Under 28 U.S.C. § 1253 this Court reviews judgments of specially constituted three-judge district courts, not orders of the Commission. It is not the practice of this Court to review administrative records in the first instance. In the event of reversal, this Court remands to the District Court for further appropriate proceedings. *United States* v. *Great Northern Railroad Co.*, 343 U.S. 562, 578 (1952).

positive of appellants' arguments that the Commission is free to use undefined Transportation Act standards in determining the antitrust policy to be accommodated in this proposed merger. The Court conclusively establishes that its holding is not only consistent with but compelled by *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), and the statutory duties and powers of the Commission under the Transportation and Clayton Acts.

Florida East Coast does not consider it necessary to reiterate the District Court's perceptive analysis of the Commission's failure to discharge its statutory responsibilities. The judgment below is plainly correct for reasons stated in the opinion, and should be summarily affirmed.

Summary affirmance would permit the parties and the Commission to undertake promptly the further proceedings, findings, and orders necessary to proper disposition of this proposed railroad merger.

2. Appellants urge that administrative burdens interfering with prompt disposition of railroad merger applications will be imposed by the District Court's requirement to state antitrust conclusions in terms of the geographic and service markets in which the probable competitive effects of the proposed merger "may be substantially to lessen competition" or "tend to create a monopoly" (J.S. No. 555, p. 16, and J.S. No. 425, p. 27). The Commission complains that the District Court's opinion leaves uncertain the extent of market investigation required, and recites a list of considerations claimed to create special problems for market definition in transportation mergers (J.S. No. 555, pp. 17-18). Seaboard, et al., allege that the Dis-

trict Court's opinion would compel a two-step procedure with endless complications in a meaningless search for relevant markets (J.S. No. 425, pp. 27-28).

These theoretical problems and difficulties are designed as makeweights to appellants' claim that plenary review by this Court is warranted. The Commission has not yet attempted to make any meaningful market analysis of the anticompetitive consequences of this merger. Whether in fact the decision of the District Court creates any procedural or factual difficulty can be determined only when the Commission attempts to make the required analysis.

Florida East Coast believes that the abstract problems and difficulties suggested by appellants would never arise in this or any other railroad merger proceeding before the Commission.

The District Court's opinion does not foreclose consideration of special transportation factors that may affect the definition of markets in railroad merger proceedings. Quite the contrary. The Court set general standards for appraising geographic markets and service markets, based on *United States* v. *The Philadelphia National Bank, et al.*, 374 U.S. 321 (1963). The Commission is free to apply transportation expertise to formulation of the actual markets in which to appraise the anticompetitive consequences of the merger. The District Court pointed out that, under relevant antitrust criteria, "the geographic market selected must both correspond to the commercial realities of the industry and be economically significant." 242 F. Supp. at 23. Service markets are to be determined by reasonable interchangeability of use or cross-elasticity of demand between the service itself

and substitutes for it. Submarkets are to be determined by examining "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the service's peculiar characteristics and uses, unique service facilities, distinct customers, distinct prices and sensitivity to price changes." 242 F. Supp. at 23.

The Commission is not required to manufacture a limitless number of unrealistic and theoretical markets. The District Court's holding contemplates, as would any common sense approach to the problem, a consideration of geographic and service markets in terms that have practical, economic significance in the transportation industry. No separate antitrust trial, no complicated two-step procedure, and no trial of issues alien to the transportation industry is required. Evidence essential to the meaningful analysis required by the District Court is largely, if not entirely, a matter of record in this proceeding. Indeed, the evidentiary record essential to an adequate antitrust analysis normally must be developed for correct resolution of related issues raised under section 5(2)(c) and the National Transportation Policy in any merger before the Commission; i.e., the effect of the merger upon adequate transportation service to the public as well as recognition of inherent advantages in rail transport and the promotion of adequate, efficient service and sound economic conditions in the industry.

A requirement of adequate findings is fully compatible with the vast powers to be exercised by the Commission in this proceeding. The Commission is asked to authorize and to immunize from the antitrust laws a merger that would create a monopoly in Florida

and substantially reduce existing railroad competition throughout the Southeast. The railroad competition to be destroyed by the merger will be destroyed forever. An improvident decision by the Commission can never be corrected. There is no prospect for creation of a new rail system to replace the competitive rail services to be extinguished by this merger. Adequate findings reflecting full discharge of the Commission's duty are not "too high a price to be paid" (J.S. No. 555, p. 18) for justification of the railroad monopoly to be created by this merger.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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October 1965